

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

Verizon New England, Inc.
Plaintiff

v.

New Hampshire Public Utilities
Commission,
Defendant

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Civil No. 04-CV-65-B

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE
BY THE CONSUMER ADVOCATE OF THE STATE OF NEW HAMPSHIRE**

The Office of Consumer Advocate of the State of New Hampshire (OCA) hereby moves to intervene as a party in the above-captioned proceeding pursuant to Rule 24(a) of the Federal Rules of Civil Procedure (F.R.C.P.), or in the alternative Rule 24(b).

1. In fulfillment of F.R.C.P. Rule 24(c), the OCA seeks to intervene in order to oppose Verizon's claims that the Public Utilities Commission (PUC) Order No. 24,265, (PUC Order) violates the Federal Communications Commission's (FCC's) binding total element long run incremental costs (TELRIC) rules and sections 251 and 252 of the 96 Telecommunications Act, 47 U.S.C. Section 151 et.seq., as well as its claims that the PUC's adoption of a cost of capital of 8.2 % is arbitrary and capricious.

2. By statute the OCA is delegated both the power and duty to intervene in all courts, including the federal courts, on behalf of residential utility customers.

“The Consumer Advocate shall have the power and duty to petition for, initiate, appear or intervene in any proceeding concerning rates, charges, tariffs, and consumer services before any board, commission, agency, court, or regulatory body in which the interests of residential utility consumers are involved and to represent the interests of such residential utility consumers.” N.H. Rev. Stat. Ann. 363:28, II (Supp. 2003).

3. Notwithstanding this New Hampshire statutory directive, a federal court must still determine the OCA’s right to intervene in any litigation pursuant to F.R.C.P. Rule 24(a). Public Service Company of New Hampshire v. Patch, 136 F.3d 197, 208 (1st Cir.1998).

4. Federal Courts ruling on intervention requests under Rule 24(a) apply a four part analysis:

“A party that desires to intervene in a civil action under Rule 24(a)(2) must satisfy four conjunctive prerequisites: (1) a timely application for intervention; (2) a demonstrated interest relating to the property or transaction that forms the basis of the ongoing action; (3) a satisfactory showing that the disposition of the action threatens to create a practical impairment or impediment to its ability to protect that interest; and (4) a satisfactory showing that existing parties inadequately represent its interest.” Public Service Company of New Hampshire v. Patch, 136 F.3d at 204. citing Conservation Law Foundation v. Mosbacher, 966 F.2d 39, 41 (1st Cir 1992).

5. The OCA’s Motion to Intervene is timely because the Defendant, PUC, has not yet filed its answer to Verizon’s Complaint. The OCA’s participation will not delay the progress of this case.

6. The OCA, by statute, represents New Hampshire’s residential ratepayers. As described in more detail in the motion, those ratepayers are directly impacted by the rates set for Verizon’s unbundled network elements (UNE’s). The UNE rate setting process is the subject of this litigation. Recently, the District of Columbia Court of Appeals, when ruling on the standing of NASUCA (National Association of State Utility Consumer Advocates), ruled that NASUCA had not presented sufficient

evidence of its representation of consumers, but held that the FCC's actions regarding UNE's were sufficient to cause an injury to consumers:

“A petitioner's standing is self-evident only if ‘no evidence outside the administrative record is necessary for the court to be sure of it.’ [citation omitted] Contrary to the Commission's assertions, we believe that no evidence outside the administrative record is necessary to explain how (on NASUCA's view of the merits) the Order injures the consumers that NASUCA claims to represent. See NASUCA ex parte letter (Feb. 13, 2002) at 2-3. On the theories advanced by NASUCA, consumers would enjoy a superior price/quality trade-off in telephone service if the Commission accepted its analysis. But it is not at all self-evident from the record that NASUCA meets the associational standing criteria established in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 344-45 (1977), for entities that are not voluntary membership organizations. See also, Fund Democracy, LLC v. SEC, 278 F.3d 21, 25-26 (D.C. Cir. 2002); Am. Legal Found v. FCC, 808 F.2d 84, 89-90 (D.C. Cir. 1987). Although utility consumer interests are clearly affected by the Order, nothing in the administrative record or NASUCA's opening brief establishes that NASUCA is qualified to represent those interests in federal court. We therefore conclude that NASUCA lacks standing and do not reach the merits of its claims.” United States Telecom Association v. FCC, No. 00-1012 slip op. at 60 (D.C. Cir. March 2, 2004).

The FCC order discussed in the recent USTA case was the FCC's Triennial Review Order which established the process for deciding what UNE's would be offered by incumbent telephone carriers, such as Verizon. The availability of UNE's, like the pricing of those UNE's, are both issues which have a profound effect on the cost and service options available to consumers in New Hampshire. As a result, New Hampshire's residential consumers have an interest in the outcome of this case sufficient to meet the Federal Courts' second criteria under Rule 24(a).

7. If the OCA is prevented from intervening in this lawsuit, it will not be able to defend residential ratepayers' interests in this proceeding. There is a possibility that at the conclusion of this suit the Court will determine that a different cost of capital is more appropriate for UNE's in New Hampshire. If that is the case, residential ratepayers may

be adversely effected in either the costs or the services available to them for basic telephone service. As a result, the third prong of the Rule 24(a) intervention test is met.

8. The fourth and final element of the Rule 24(a) analysis involves the question of whether other parties to the litigation adequately represent the interests of residential ratepayers. The question of whether another party adequately represents the interests of residential ratepayers is a very contextualized holding and therefore other cases involving different claims are not binding on this Court. See, Public Service Company of New Hampshire v. Patch, 136 F.3d at 209 fn 9. The Court in the Patch case elaborated on this observation by indicating that ratemaking cases might provide a basis for OCA to claim that it was not adequately represented by the PUC.

“Our contextualized holding should ease the amici’s concern that failure to allow OCA to intervene will impair the effectiveness of similar consumer advocacy organizations in other litigation. If, for example, PSNH had included in its complaint claims that would necessitate a viewpoint-balancing analysis in which consumer concerns played a significant role, we would see OCA’s appeal in a vastly different light.” Id.

9. OCA submits that this wholesale ratemaking litigation necessitates just such a “viewpoint-balancing analysis” and requires that a party with only the interests of retail ratepayers participate. Therefore, the fourth requirement of Rule 24(a) is met.

10. For the reasons discussed above OCA should be allowed to intervene in this suit pursuant to F.R.C.P. Rule 24(a) in order to represent the interests of residential ratepayers.

11. Finally, OCA believes that the Federal Courts’ reluctance to allow consumer interventions in state rate case proceedings when those state proceedings are appealed to the federal courts has the effect of converting multiparty disputes to two party disputes and dangerously compromises consumers’ rights to due process.

Respectfully submitted,

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